



Supreme Court, U.S.

FILED

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No. _____

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF COLORADO,

Petitioner,

vs.

ROBIN AULD,

Respondent.

Petition For Writ Of Certiorari
On Certiorari To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995

PETITION FOR WRIT OF CERTIORARI

MILTON K. BLAKEY*
District Attorney

KEITH CROSS
Assistant District Attorney

Special Prosecutors

Attorneys for Petitioner

109 8th Street, Suite 308
Glenwood Springs, Colorado
81601

Telephone: (303) 945-8635

*Counsel of Record



QUESTIONS PRESENTED FOR REVIEW

1. Whether the court violated the doctrine of separation of powers by dismissing the prosecution of an attorney allegedly engaged in criminal activity on the basis that the government filed a fictitious court case as a part of its undercover investigation, absent any finding that the attorney's constitutional rights were violated?

2. Whether the United States Constitution required dismissal of criminal charges on the grounds that the government's filing of a fictitious court case as a part of its undercover investigation constituted outrageous governmental misconduct?

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No. _____

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In The
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October Term, 1991
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THE STATE OF COLORADO,
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vs.

ROBIN AULD,
Respondent.

—◆—
**Petition For Writ Of Certiorari
On Certiorari To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995**
—◆—

PETITION FOR WRIT OF CERTIORARI
—◆—

OPINION BELOW

The Colorado Court of Appeals affirmed the state district court's pre-trial dismissal of a criminal prosecution against the respondent, attorney Robin Auld, on charges of Theft Receiving and Possession of a Dangerous Weapon (Colorado Stat., Sections 18-4-410 and 18-12-102 1986). The Colorado Court of Appeals found that the government's filing of a fictitious court case in order to place an undercover officer in the position of the defendant's "client" impermissibly involved the judiciary as an unwitting accomplice to the government's undercover operations and constituted outrageous governmental

misconduct violative of the Due Process Clause. This opinion is published as *People v. Auld*, 815 P. 2d 956 (Colo. App. 1991), and is attached as Appendix A.

Petitioner then sought certiorari from the Colorado Supreme Court. Certiorari was denied on August 26, 1991, although Chief Justice Rovira stated that he would grant certiorari as to the court's finding of outrageous governmental misconduct and the issue of the doctrine of separation of powers. (See Appendix B.) The Colorado Court of Appeals then issued its mandate on September 12, 1991, affirming the lower court's judgment of dismissal. (See Appendix C.)

JURISDICTION

The Colorado Court of Appeals found that the government's conduct in filing the fictitious court case during the investigatory phase of the prosecution violated fundamental fairness and was shocking to the universal sense of justice required by the Due Process Clause, citing, as authority, *United States v. Russell*, 411 U.S. 423 (1973). The Colorado Court of Appeals did not rely upon any independent state ground for its decision, finding, instead, that the doctrine of the separation of powers had been violated when the government impermissibly involved the court as an unwitting accomplice to its investigation. The highest state court, the Colorado Supreme Court, denied the government's request for certiorari on August 26, 1991. The certiorari jurisdiction of this Court is, therefore, invoked pursuant to 28 U.S.C., Section 1257.

Additionally, the Colorado Court of Appeals has decided a federal question in a way that conflicts with the decision of another state court of last resort, and its decision involves an important question of federal law which has not been, but should be, decided by this Court. Thus, certiorari jurisdiction is also invoked pursuant to Sup. Ct. R. 10.1 (b) and (c).

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution provides in pertinent part: "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Amendment V of the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1, of the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

FACTUAL BACKGROUND

The respondent, an attorney, was arrested on October 29, 1988, in Durango, Colorado, for possession of a fully automatic UZI machine gun which had been given to him in lieu of a fee by an undercover officer posing as his

client. The investigation of the respondent was part of a task force project called "LEADS" (Law Enforcement Against Drugs) funded by a federal grant to combat the narcotics trade in southwest Colorado. Based upon information that the respondent was either involved in the drug trade or would accept drugs in lieu of legal fees, the task force, with the advice of the district attorney for the Sixth Judicial District, decided to target the respondent.

In order to facilitate the plan, an undercover officer who had been making drug purchases for the task force was arrested and placed in jail on a misdemeanor charge of possession of marijuana. A fictitious affidavit and other papers were filed with the county court with the knowledge and consent of the district attorney. The undercover officer subsequently sought the services of the respondent.

The undercover officer offered to pay the respondent for his legal services by giving him drugs. The respondent declined that offer but indicated that he would accept a gun at a "blackmarket price" in lieu of his fee. After a series of negotiations, the respondent agreed to accept a reportedly stolen, fully automatic UZI machine gun as payment for his fee. This transaction, which occurred in the respondent's office, was recorded by the undercover officer and monitored by a surveillance officer. Shortly after receiving the weapon, the respondent was arrested.

The district attorney removed himself from the case prior to the filing of any charges against the respondent. A special prosecutor, appointed by the court, decided to

file felony charges of Theft Receiving and Possession of an Illegal Weapon against the respondent.

STATE COURT PROCEEDINGS

In pre-trial motions, the respondent asked that the case against him be dismissed. The trial court granted the motion to dismiss based upon the government's filing of fictitious documents with the county court, as well as the false statements made in open court by the undercover officer prior to the respondent's arrest. After a lengthy hearing, the trial court concluded that the government had impugned the integrity of the courts by covertly involving a court in its undercover operation.

The Colorado Court of Appeals concurred with the trial court, rejecting the government's argument that the trial court's pre-trial dismissal of the charges violated the doctrine of separation of powers. The Colorado Court of Appeals stated that it was the government that had violated the separation of powers doctrine by involving a court in its investigation. Neither the trial court, in its written opinion dismissing the case, nor the Colorado Court of Appeals, in its published opinion, articulated any prejudice to the defendant's rights created by the government's actions.

In separate actions, both the respondent and the district attorney for the Sixth Judicial District were disciplined by the Colorado Supreme Court. The respondent received a six-month suspension, *People v. Auld*, 788 P. 2d 1275 (Colo. 1990), and the district attorney received a public censure in a decision announced on October 21,

1991, *People v. Reichman*, Supreme Court, State of Colorado, No. 90SA485. The special prosecutor took no part in these independent actions. The special prosecutor has filed this request for certiorari review as a result of the Colorado Court of Appeals decision affirming the trial court's dismissal of the criminal case against the respondent.

REASONS FOR GRANTING THE WRIT

The state court below has set a significant precedent by construing the language¹ of *United States v. Russell*, 411 U.S. 423 (1978) to permit the dismissal of a criminal case without finding any violation of the defendant's constitutional rights.

This Court has never sanctioned the dismissal of a case solely on the grounds that the government's conduct was so outrageous as to constitute a violation of due process.² The majority of the federal circuit courts have

¹ " . . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952) . . . " *United States v. Russell*, 411 U.S. at 431-32.

² See *United States v. Russell*, 411 U.S. 423 (1978); *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Payner*, 447 U.S. 727 (1980); *United States v. Hasting*, 461 U.S. 499 (1983).

similarly held that, in the absence of a violation of the defendant's fundamental rights, the government's misconduct in the investigatory stage of a case cannot be the sole grounds for dismissal.³ In at least two instances, a state court examining the issue of the government's prosecution of fictitious cases in order to plant an undercover officer within the criminal justice system has similarly held that dismissal was not warranted.⁴

This Court has never addressed the issue of the government's use of an undercover agent within the court system itself. Such a procedure invariably involves some level of deceit, as well as the potential violation of one or more of the tenets of the Code of Professional Responsibility.

The investigation of an attorney who accepts stolen or illegal property in lieu of legal fees will almost invariably require the use of an undercover agent. It is unlikely

³ See *United States v. Dyman*, 739 F. 2d 762 (2d Cir. 1984); *United States v. Pagan*, 721 F. 2d 24 (2d Cir. 1983); *United States v. Janotti*, 673 F. 2d 578 (3rd Cir. 1982), cert. denied, 457 U.S. 1108, 102 S. Ct. 2908, 73 L. Ed. 2d 1317 (1982); *United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987); *United States v. Weisz*, 718 F. 2d 413 (D.C. Cir. 1983); *United States v. Garrett*, 716 F. 2d 257 (5th Cir. 1983); *United States v. Thoma*, 726 F. 2d 1191 (7th Cir. 1984); *United States v. Murphy*, 768 F. 2d 1518 (7th Cir. 1985), cert. denied, 106 S. Ct. 1188, 89 L. Ed. 2d 304 (1986); *United States v. Leroux*, 738 F. 2d 943 (8th Cir. 1984); *United States v. Gamble*, 737 F. 2d 853 (10th Cir. 1984); *U.S. v. Puett*, 735 F. 2d 1331 (11th Cir. 1984); *United States v. Haimowitz*, 725 F. 2d 1561 (11th Cir. 1984).

⁴ See *Nigrone v. Murtagh*, 46 App. Div. 343, 362 N.Y.S. 2d 513, (1974); *People v. Archer*, 68 App. Div. 2d 441, 417 N.Y.S. 2d 507 (1979).

that the uncorroborated testimony of a former client will ever be sufficient to sustain the government's burden of proof. The undercover agent's legitimacy as a criminal defendant cannot be established without the filing of a fictitious case with the court. Although no one is likely to find such a procedure very palatable, it is constitutionally the responsibility of the government to determine if it is necessary.

There are important policy considerations at stake in this case. When a criminal defense lawyer accepts stolen property or contraband from a client, that lawyer promotes crime. The criminal justice system should not serve to engender new criminal activity. Nor are mere disciplinary procedures sufficient to address the problem. The government should be permitted to bring to trial any individual suspected of crimes against the State, regardless of the status or position of that person.

If the Colorado Court of Appeals is permitted to dismiss a case based upon an erroneous application of the Due Process language of *Russell*, other courts may do likewise. The Court of Appeals disregarded two significant federal precedents in this area. In *United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987), the Court of Appeals for the Third Circuit reversed a District Court's decision to dismiss an indictment based upon the government's issuance of a "sham" grand jury subpoena as a part of an undercover investigation of an attorney. No attempt had been made in *Martino* to inform the supervising judge of the government's clandestine use of a fictitious subpoena. Nevertheless, the Third Circuit held that none of the defendant's constitutional rights had been compromised.

In *United States v. Murphy*, 768 F. 2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986), the Circuit Court of Appeals for the Seventh Circuit addressed the issue of alleged governmental misconduct in a federal investigation of corrupt judges in the Chicago courts. The investigation, labelled "Operation Greystone," utilized undercover agents posing as criminal defendants in fictitious cases in order to investigate allegations of bribery against certain judges, bail bondsmen, and attorneys. In addition to the filing of fictitious cases, perjured testimony was given by law enforcement officers in furtherance of the undercover operation. The Seventh Circuit Court of Appeals did not find the government's conduct to be violative of the Due Process Clause.

The Colorado Court of Appeals distinguished the *Murphy* decision by stating that the "Greylord" investigation involved pervasive corruption within the Chicago court system and that the supervising judge had been notified of the investigation. The assessment of the degree of harm created by a suspect's activity belongs not to the court but to the government. If the government determines that the illegal activity of a single individual warrants investigation, it should be able to institute an undercover operation without fear of a reassessment of that need at some future point in time by the court.

Moreover, the proposal that the government be required to notify a supervising judge of the undercover operation merely begs the question of the government's recruiting the judiciary as its investigatory arm. As the Third Circuit Court of Appeals pointed out in *Martino*, the notification of the court transforms the appearance of

the court's participation in a governmental undercover operation into actuality. *Martino*, 825 F. 2d at 761.

The government does not suggest in this petition, nor did it suggest to the court below, that the door opened by the language of *United States v. Russell*, 411 U.S. 432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), should be closed. There may certainly be some investigative activity of the government so violative of fundamental fairness that the Due Process Clause would prohibit the prosecution of the case. However, the Colorado Court of Appeals drew the line in the wrong place and, by so doing, inhibited forever legitimate government investigation into crime occurring within the judicial system. The impact of its decision applies equally to potential investigations of attorneys, judges, prosecutors, or court personnel. Any prosecutor reading the *Auld* decision will conclude that an undercover operation involving the filing of a fictitious court case is likely to violate the Due Process Clause.

CONCLUSION

It is clear that the government's activities in this case did not violate any constitutional right of the defendant. The Colorado Court of Appeals decision, therefore, upsets the delicate balance of interests embodied in this Court's applications of the exclusionary rule. In *United States v. Payner*, 447 U.S. 727 (1980), this Court cautioned against the use of a court's supervisory powers to dismiss a case, because of the dangers inherent in the exercise of "a standardless discretion." *Payner*, 447 U.S. at 733. The

Auld decision establishes a precedent of rewarding the wrongdoer for the government's violations of an ethical rule, even when there is no arguable impact of that violation upon the defendant's rights.

If it is impermissible conduct for the government to create a fictitious case, not only will attorneys, in a practical sense, be immune from prosecution for crimes committed within the context of their legal employment, but the investigation of corrupt judges and prosecutors will likewise be curtailed. Unless the decision is reversed, the *Auld* case will continue to have a chilling effect on the government's use of covert methods to investigate crime within the justice system for years to come.

Respectfully submitted,

MILTON K. BLAKEY *
District Attorney

KEITH CROSS
Assistant District Attorney

SPECIAL PROSECUTORS

Attorneys for Petitioner
109 8th Street, Suite 308
Glenwood Springs, Colorado 81601
Telephone: (303) 945-8635

* Counsel of Record

App. 1

APPENDIX A
COLORADO COURT OF APPEALS
NO. 89CA0995

THE PEOPLE OF THE STATE)
OF COLORADO)
 Plaintiff-Appellant,)
v.)
ROBIN K. AULD,)
 Defendant-Appellee.)

Appeal from the District Court La Plata County
No. 88CR129

Honorable Richard J. Brown, Judge

DIVISION III JUDGMENT AFFIRMED
Opinion by JUDGE NEY
Metzger and Ruland, JJ., concur

Keith Cross, Special Prosecutor
Glenwood Springs, Colorado

Attorney for Plaintiff-Appellant

Haddon, Morgan & Foreman, P.C.

Harold A. Haddon

Rachel A. Bellis

Denver, Colorado

Attorneys for Defendant-Appellee

The People appeal the judgment of the district court dismissing a criminal information charging defendant, Robin K. Auld, with one count of theft by receiving and one count of possession of a dangerous weapon. We affirm.

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In 1988, La Plata County law enforcement officials obtained a federal funding grant for the conduct of undercover activities aimed at drug trafficking, a project known by the acronym LEADS. The steering committee for LEADS included the sheriff of La Plata county, the district attorney for the Sixth Judicial District, and police chiefs of various police departments within the judicial district. Based on unsubstantiated information, the LEADS Committee initiated an undercover operation targeting the defendant, who was an attorney.

A fictitious complaint was filed against a "Colton Young" in the county court. "Colton Young" was in fact the alias of an undercover agent. The fictitious complaint was drafted by the district attorney, typed by his secretary, signed by a sheriff's officer, and notarized by the wife of the district attorney.

"Colton Young" was "charged" with carrying a concealed weapon and possessing marijuana. He was brought before a county judge, advised of his rights, and questioned by the court about general information relating to his identity, status, and bond. The undercover agent made several false statements to the judge, who was unaware of his true identity, and posted a surety bond, which was sworn to under oath in front of a deputy clerk for the county court. "Colton Young" then retained the defendant to represent him in his defense. The defendant telephoned the court to determine the status of the charges against "Colton Young."

After having paid the defendant his retainer in cash, the undercover agent asked if the remainder could be

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paid by giving something in trade. The defendant immediately replied that if cocaine was being suggested, he would not accept it; however, he stated that he might be interested in a gun at "a black market price."

Under the terms of the LEADS grant, the scope of its activities was limited to drug enforcement activities; therefore, the program could no longer be used to justify further action after the defendant rejected the opportunity to take drugs in exchange for legal services. Nevertheless, the LEADS committee, through the undercover agent, presented the defendant with weapons, first as collateral for his fee, and eventually in payment of his fee. His acceptance of an Uzi semiautomatic rifle led to the charges against the defendant.

After the defendant's arrest, the district attorney and law enforcement officers discussed with him the possibility that the charges would "go away" if he provided information about a number of people, including present or former clients. The defendant refused.

In response to a pretrial motion by defendant, the charge was dismissed, and this appeal was pursued by current counsel for the People.

I.

The People assert that the trial court's dismissal of the case against the defendant violates the doctrine of separation of powers. We disagree.

The United States Supreme Court has recognized the existence of the legal defense of outrageous governmental

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conduct and has found application of a court's supervisory powers in dismissing a criminal case may be proper if the government's conduct has violated fundamental fairness and is shocking to the universal sense of justice. *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Colorado recognized the due process claim of outrageous governmental conduct in *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

In *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988), this concept was again at issue. There, the court accepted its viability, but it determined that an undercover agent's encouragement of a minor to purchase drugs and commit crimes, as well as providing a minor with illegal drugs, was not so extreme and outrageous as to amount to a denial of due process. Accordingly, the trial court's dismissal of delinquency proceedings against the minor was reversed by the supreme court.

Relying on *People in Interest of M.N.*, *supra*, the trial court here *denied* defendant's motions to dismiss that were grounded on governmental misconduct and outrageous governmental conduct which denied him due process, on targeting him without probable cause or reasonable suspicion, on failure to cease the operation when he refused drugs, and on infringement of the attorney-client relationship. However, the court granted defendant's motion to dismiss based on alleged outrageous governmental conduct that had implicated the court in law enforcement activities.

The People in effect admit that the district attorney here has perpetrated a fraud upon a court of this state by filing false documents, making false statements to a

judge, and creating a counterfeit prosecution. They further concede that as a result of the district attorney's activities, the county court was duped into playing an active part in the prosecutorial function of the executive branch. It was therefore the executive branch which initially violated the doctrine of the separation of powers.

As the trial court correctly observed:

"How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. . . . If there is any separation of powers and any independence of the branches of the government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense."

We agree with this analysis and reject any invocation of the separation of powers doctrine as a basis for reversal of the trial court's ruling.

II.

The People next assert the trial court's dismissal must be reversed because the government's conduct did not prejudice the defendant. We disagree.

The People suggest that there is no Colorado case and very few cases in other jurisdictions which support dismissal for government misconduct absent a finding of

actual prejudice to the defendant. This argument incorrectly assumes that the court's dismissal was based upon the improper conduct of targeting the defendant in an investigation without reasonable suspicion or attempting to use an attorney as an informant against his clients. However, as noted above, these acts of governmental misconduct were not the basis of the dismissal.

Therefore, we are unpersuaded by the People's argument that, since no actual prejudice to the defendant by the governmental misconduct was demonstrated, the dismissal for outrageous governmental conduct cannot stand.

III.

The People further contend that the trial court erred in dismissing the charges against the defendant based upon the outrageous governmental conduct that implicated the court in the prosecution aspect of the law enforcement process. We again disagree.

Relying on the reasoning of *United States v. Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986), the trial court exercised its supervisory power in protecting judicial integrity in the face of governmental misconduct. The trial court found, with evidentiary support, that the conduct of the district attorney, an officer of the court, and the law enforcement agencies may have violated the Colorado Criminal Code relating to perjury and false swearing.

In addition, the district attorney may very well have violated the Code of Professional Responsibility by using

perjured testimony, making false statements to the court, and by the manner in which he performed the duties of a public prosecutor. Also to be considered is ABA, *Standards for Criminal Justice*, Standard 3-2.8(a) (1980) which denotes as unprofessional conduct the intentional misrepresentation by a prosecutor of matters of fact or law to the court.

The foregoing list of potential violations, which is not intended to be exhaustive, committed by the district attorney and law enforcement agencies for the purpose of duping a court into becoming an accomplice in their law enforcement function must be condemned by this court.

Relying on *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), the People assert that even though some rules have been broken, dismissal is not warranted even if the courts have been compromised.

The People's reliance on *Murphy* is misplaced. *Murphy*, which arose out of a federal investigation of corruption in the Chicago judicial system, is readily distinguishable.

An undercover investigation of an allegedly corrupt court system necessarily implicates the court system, and the Chicago investigation was conducted under the supervision of the presiding judge. Here, there was neither a corrupt court to be investigated, nor judicial supervision of the investigative activities.

We conclude that the trial court correctly determined that the conduct of the executive branch in compromising the judicial branch, thereby making it an unknowing

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accomplice to undercover prosecution activities, was so outrageous that appropriate sanctions are required.

IV.

The People finally assert that even if sanctions are appropriate, dismissal is too severe a sanction. In response to an invitation to suggest an appropriate sanction, the People have proposed that the political process may provide the only appropriate remedy. We are unpersuaded that the sole remedy lies in the electoral process. We conclude that when the integrity of the court is compromised, as here, by overzealous prosecution, dismissal of the case is an appropriate remedy.

The judgment is affirmed.

JUDGE METZGER and JUDGE RULAND concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO

Case NO. 91SC158

Certiorari to the Colorado Court of appeals 89CA0995

La Plata County District court 88CR129

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

ROBIN K. AULD,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 26, 1991.

CHIEF JUSTICE ROVIRA would grant as to the following issues:

Whether the court of appeals erred in affirming the trial court's dismissal of the case as not violative of the doctrine of separation of powers by infringing upon the authority of the district attorney to carry out his or her

constitutionally imposed duty to enforce the criminal laws of the State of Colorado.

Whether the filing of a fictitious county court case, in order to place an undercover officer in the position of the "client" of the defendant, an attorney, and the subsequent dismissal of the case, constitute outrageous governmental misconduct under Colorado law.

[SEAL]

cc:

Keith Cross
Special Prosecutor
Assistant District Attorney
109 8th St., Suite 308
Glenwood Springs, CO 81602

HADDON, MORGAN & FOREMEN
Harold A. Haddon
Rachel A. Bellis
150 E. 10th Ave.
Denver, CO 80203

Honorable Richard J. Brown
La Plata County District Court
1060 Second Avenue
P.O. Box 3340
Durango, CO 81302-3340

James Benway, Clerk
Colorado Court of Appeals

APPENDIX C

Appeal from the District Court of La Plata County, Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered January 17, 1991 before Ney, Metzger and Ruland, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 89CA0995
Trial Court No. 88CR129

PEOPLE v. ROBIN K. AULD

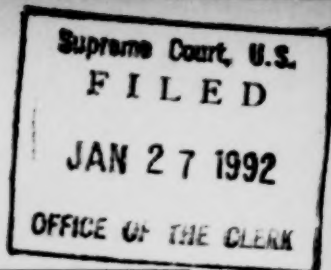
This cause came to be heard on the record on appeal from the District Court of La Plata County, and was argued by counsel, on consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

DATE: September 12, 1991 JAMES G. BENWAY
Clerk of Court

By: /s/ _____
Deputy Court Clerk

2

No. 91-841



In The
Supreme Court of the United States
October Term, 1991

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THE STATE OF COLORADO,

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v.

ROBIN AULD,

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— ♦ —
On Petition For Writ Of Certiorari
To The Colorado Court Of Appeals
Court Of Appeals No. 89CA0995

— ♦ —
RESPONDENT'S BRIEF IN OPPOSITION
— ♦ —

HADDON, MORGAN & FOREMAN, P.C.

HAROLD A. HADDON
(Counsel of Record)

RACHEL A. BELLIS
150 East Tenth Avenue
Denver, Colorado 80203
(303) 831-7364

Attorneys for Respondent

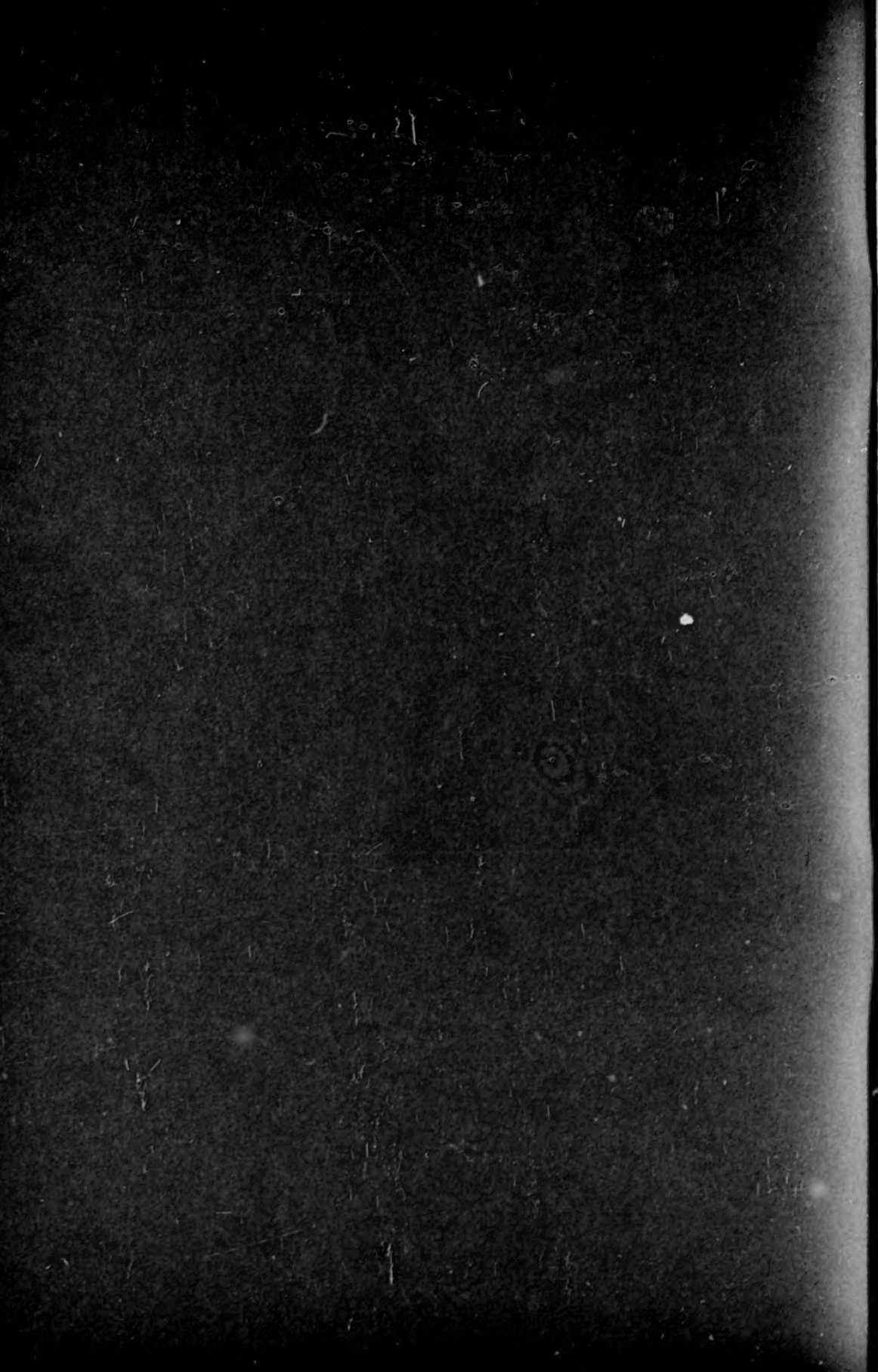


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INTRODUCTION

Respondent Robin Auld opposes the State of Colorado's Petition for Writ of Certiorari to review the judgment and opinion of the Colorado Court of Appeals in *People v. Auld*, 815 P.2d 956 (Colo. App. 1991), *cert. denied*.

Seeking to fashion a federal case out of the state court's application of state constitutional principles, Petitioner has misstated the holding of the Colorado Court of Appeals in the Opinion Below (Petition pp. 1-2), misrepresented the grounds upon which Petitioner requested review in the Colorado Supreme Court (Petition p. 2), and manufactured, for this Court's consideration, legal questions that are not ever raised by the Colorado court's decision.

The Colorado Court of Appeals' opinion is based upon a well-developed factual record. (Petitioner's App. pp. 2-3) Mr. Auld is an attorney whose practice in Durango, La Plata County, Colorado emphasized the defense of individuals accused of crimes. Based on a stale and unsubstantiated rumor that Mr. Auld at one time accepted drugs in lieu of fees, the steering committee for a La Plata County anti-drug program ("the Committee") made Mr. Auld the target of an undercover investigation. The members of the Committee – the local District Attorney, the County Sheriff, and other local police and sheriff's officials – often discussed their desire to compromise Mr. Auld and then pressure him into providing incriminating information about his clients and other members of the community. To that end, the Committee devised an elaborate scheme. A fictitious complaint, drafted by the District Attorney, typed by his secretary, signed by a

County Sheriff's officer and notarized by the District Attorney's wife, was filed in the local county court. The "complaint" purported to "charge" an undercover sheriff's officer with possession of drugs and weapons. The undercover officer was brought before the county court judge to answer to the fake "charges". The county court judge was completely unaware of the pivotal role she was to play in this charade. The undercover officer made false statements to the county court judge and lied under oath to obtain his release on a surety bond. The undercover officer then came to Mr. Auld for legal assistance in his "pending criminal case."

The officer did retain Mr. Auld, paying a small retainer fee in cash derived directly from the drug enforcement funds. When the officer suggested paying the balance of Mr. Auld's fee by giving "something in trade," Mr. Auld flatly refused to accept cocaine as payment. The undercover officer persisted in the Committee's campaign to compromise Mr. Auld in any way possible. He pressured Mr. Auld to accept a weapon as a fee. Mr. Auld refused. The officer pressed him again. Mr. Auld steadfastly demanded proper cash payment. Finally, reluctantly, and after unrelenting pressure from the officer, Mr. Auld agreed to hold a gun at a "black market price," but only as collateral for the money owed. Then the undercover officer stated that he was leaving town for good and absolutely could not pay \$500 in outstanding legal fees. Mr. Auld unwillingly agreed to take the weapon in payment for the debt. As soon as Mr. Auld took possession of the weapon he was arrested.

Immediately following the arrest, the District Attorney and his agents told Mr. Auld that possible charges

would “go away” if Auld violated his attorney-client privilege by providing information on present and former clients. (Petitioner’s App. p. 3) Mr. Auld refused. See *People v. Auld*, 788 P.2d 1275 (Colo. 1990). As a result, charges were filed. The District Attorney obtained appointment of a special prosecutor, an assistant district attorney from another judicial district (now appearing as counsel for Petitioner), to handle the case, and charges were filed.

On Mr. Auld’s motion, and after extensive evidentiary hearings, the state district court dismissed the charges, holding that the state prosecutor’s outrageous misconduct in making the case violated the *state’s doctrine of separation of powers*. (See Respondent’s Appendix.)

Petitioner appealed the dismissal to the Colorado Court of Appeals. In a fact-driven decision based wholly on Colorado constitutional principles, the Colorado Court of Appeals found that the state prosecutors had committed outrageous misconduct violating the doctrine of separation of powers, that the imposition of the sanction of dismissal was an appropriate exercise of the court’s supervisory power, and that dismissal under these specific circumstances did not violate the doctrine of separation of powers. (Petitioner’s App. pp. 3-8)

Contrary to Petitioner’s characterization of the state court proceedings, the district court did *not* hold that the government’s misconduct violated the Due Process Clauses of the Fifth or Fourteenth Amendments of the United States Constitution, and the order of dismissal was *not* based on a due process violation. Nor did the Colorado Court of Appeals hold that the government’s

misconduct violated the Due Process Clause of the United States Constitution. The Colorado Court of Appeals declined to apply a due process analysis to this case but focused instead on the state court's authority to exercise its supervisory powers in response to the state prosecutor's violation of separation of powers. (Petitioner's App. p. 6)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Questions presented in the Petition were not preserved or decided in the proceedings below.

To make it appear that a federal constitutional question is present, Petitioner's Questions Presented for Review frames the issue as follows: Once a criminal defendant establishes that charges against him were the product of pervasive government misconduct, when does the United States Constitution require dismissal of the criminal charges and when does the separation of powers doctrine prohibit dismissal? The remainder of the Petition suggests in various ways that the courts below dismissed charges pending against Mr. Auld to vindicate some ill-defined notions of due process of law rather than some firmly-rooted constitutional principle. In fact, the questions raised in the Petition are neither reflected nor preserved in the proceedings below.

In the district court, Mr. Auld argued two separate motions seeking pre-trial dismissal of the charges lodged against him. Mr. Auld's *first* motion, which was rejected by the court, asserted that outrageous misconduct by the District Attorney and his confederates violated Mr.

Auld's right to due process of law. This due process motion was denied. (Respondent's Appendix p. 3) However, the court agreed with Mr. Auld's *second* motion, which argued that government misconduct violated the state law doctrine of separation of powers and warranted dismissal as a matter of the court's supervisory power over public prosecutors. (Respondent's Appendix p. 14)

Citing the state judiciary's power to protect itself against public prosecutors who would make the courts accomplices to prosecutorial misconduct, the district court observed:

How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. . . . If there is any separation of powers and any independence of the branches of government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense . . .

The courts should not, and this Court certainly does not, sanction the filing of false and fictitious documents with the Court nor the securing of false and fraudulent misrepresentations to the Court regardless of the motive. In my mind, this is a clear line of distinction which separates this case from . . . those cases [decided under due process principles] and constitutes an impermissible taint upon the integrity and impartiality of

the courts. Therefore, defendant's motion to dismiss for governmental misconduct is granted.

(Respondent's Appendix pp. 11-14)

Petitioner appealed this order of dismissal to the Colorado Court of Appeals. Mr. Auld did not cross-appeal the denial of his due process motion, and that matter therefore was not before the Court of Appeals.

In its briefs to the Colorado Court of Appeals, Petitioner admitted what the district court had found – that state agents had committed acts which might be chargeable as criminal offenses in their pursuit of Mr. Auld. Petitioner nonetheless contended that because Mr. Auld's due process rights were not violated by that misconduct, dismissal under the circumstances violated separation of powers principles. The Court of Appeals rejected Petitioner's argument, finding that the local prosecutor's conduct violated the doctrine of separation of powers, that the courts possess supervisory power to fashion a remedy for such abuses of prosecutorial authority and that dismissal was an appropriate remedy in this case. The Court of Appeals declined Petitioner's invitation to apply a due process analysis to the facts presented. (Petitioner's App. p. 6) The Court of Appeals also rejected Petitioner's contention that the electoral process afforded the sole remedy for this prosecutorial abuse.

Petitioner filed a petition for certiorari in the Colorado Supreme Court, raising only the following related issues of *state* law: (1) if the defendant is not prejudiced by prosecutorial misconduct, does dismissal violate the doctrine of separation of powers by infringing on the district attorney's authority to enforce Colorado law; (2)

was the government's conduct outrageous under Colorado law; and (3) can prosecutors file fictitious cases in enforcing Colorado law. Through the first question, Petitioner sought to vindicate the district attorney's "authority to enforce Colorado law." This authority arises exclusively under Article III of Colorado's constitution. The second question was an unabashed plea for review of these facts under Colorado's due process standards, even though the case had not been decided below on due process grounds. The third question was a request that the Colorado Supreme Court provide some guidance to state prosecutors conducting "sting" operations.

Although the Colorado Supreme Court declined to answer these questions on certiorari, the issues were laid to rest when the Supreme Court disciplined the District Attorney whose misconduct was at the center of this case. In *People v. Reichman*, 819 P.2d 1035 (Colo. 1991), the Colorado Supreme Court held that the District Attorney's "responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility," and that the District Attorney violated Colorado's Code of Professional Responsibility through the deception he practiced on the district court in his pursuit of Mr. Auld.

Thus, the issues suggested, the theme explored, even the policy concerns pressed throughout Petitioner's petition are betrayed by the procedural and factual history of this case. The decision below was not "based on an erroneous application of the Due Process language of [*United States v.*] *Russell*." (Petition p. 8) Any prosecutor who actually reads the decision rendered by the Colorado

Court of Appeals in this case could not honestly "conclude that an undercover operation involving the filing of a fictitious court case is likely to violate the Due Process Clause." (Petition p. 10) Colorado prosecutors do not have the "right" to use state court judges or the court system as players and props in their investigative schemes. Creation by the district attorney of a fictitious case is unethical conduct under Colorado law. The *Auld* decision reconfirms that state courts are empowered by Colorado's constitution to respond to this kind of prosecutorial overreaching, nothing more.

2. The decision below is based on principles of separation of powers and the state court's supervisory authority, both of which are doctrines of state constitutional law.

Petitioner's entreaty to this Court rests entirely on the premise that the courts in Colorado have overstepped federal constitutional principles in their haste to fashion a remedy for prosecutorial misconduct. Petitioner's argument flows from a fundamental misunderstanding of constitutional jurisprudence.

The Colorado court's dismissal of state charges as a remedy for a local prosecutor's misconduct in a state court proceeding is *not* prohibited by separation of powers principles embodied in the United States Constitution. While the doctrine of separation of powers may be extremely important and fundamental to both federal and state governments, there is no federal constitutional separation of powers guaranty. One could be fashioned from the "republican form of government" clause of Article IV,

Section 4, but that clause is unjusticiable. *Luther v. Borden*, 7 How. 1, 48 U.S. 1, 12 L.Ed. 581 (1849). See Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. Rev. 1135 (1970).

In state proceedings, separation of powers is a principle of state constitutional law. "Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, with respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for determination of the State." *Dreyer v. Illinois*, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L.Ed. 79, 84 (1902). See *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed. 2d 1311 (1957); *International Brotherhood v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (1950); *Highlands Farm Dairy v. Agnew*, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937). Any alleged violation by a branch of state government of that state's constitutional separation of powers is a matter of state concern and does not violate the federal constitution. *May v. Supreme Court of State of Colorado*, 374 F.Supp. 1210 (D. Colo.), *aff'd*, 508 F.2d 136 (10th Cir. 1974), *cert. denied*, 422 U.S. 1008 (1975). *Accord*, *In Re Interrogatories Propounded by the Senate*, 189 Colo. 1, 536 P.2d 308 (1975).

In Colorado, separation of powers among the three branches of government is mandated by Article III of the Colorado Constitution, *People v. District Court*, 632 P.2d 1022 (Colo. 1981), and each department of government derives its power solely from the state's constitution. *State Board of Medical Examiners v. District Court*, 138 Colo. 227, 331 P.2d 502 (1958). Thus, Petitioner's complaint that

the district court violated the doctrine of separation of powers by dismissing the charges against Mr. Auld in response to prosecutorial misconduct, raises issues only of state law.

Irrelevantly, Petitioner cites cases holding that government misconduct not rising to the level of due process violation will not warrant the dismissal of charges under federal law. (Petition pp. 6-7, n.2-4) In each case, the reviewing court concluded that misconduct, if proved, did not meet the high threshold for due process violations set by this Court in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973).

Not one of these cases considered a state court's right, guaranteed by that state's constitution, to protect its own integrity once it has been compromised by prosecutorial overreaching. Not once is the issue addressed in Petitioner's argument to this Court, yet that is the *only* reason that Colorado's courts dismissed the charges against Mr. Auld.

3. There being no federal question presented in the decision below, Petitioner cannot meet the jurisdictional requirements of 28 U.S.C. § 1257 or Supreme Court Rule 10.1.

This Court lacks jurisdiction to consider Petitioner's claims. In an effort to bring its claims before this Court under 28 U.S.C. § 1257 and Supreme Court Rule 10.1(b) and (c), Petitioner has misstated the holding of the Colorado Court of Appeals and misrepresented the constitutional basis for that holding.

This case was decided under principles of separation of powers and supervisory powers, both uniquely *state* constitutional doctrines when invoked in *state* proceedings. See Colorado Constitution Article III and Article IV, Section 2. The district court determined that the executive branch had engaged in conduct which compromised the judicial branch and violated the doctrine of separation of powers, and that this conduct was so outrageous as to demand a judicial response which protected the integrity of the court system. Exercising its supervisory power over the executive branch, the district court ordered the dismissal of the charges which were the result of that misconduct. The Court of Appeals agreed with the findings of fact, conclusions of law, and order of dismissal. Although justifiably outraged by the government's actions, the Colorado Court of Appeals expressly noted that Mr. Auld's due process claim was not the basis for the trial court's order of dismissal and was not, therefore, in issue on appeal. (Petitioner's App. p. 4)

Because this case was decided under independent state constitutional principles unrelated to the Due Process Clause or any other provision of the United States Constitution, no federal question is presented by this case. Moreover, there can be no conflict among state courts of last resort with regard to the issue determined by the Colorado Court of Appeals, since the case interprets and applies only Colorado's constitution. Petitioner can offer no legitimate reason why this Court should accept jurisdiction in this case.

CONCLUSION

Petitioner misapprehends the basis for the Court of Appeals' decision in *People v. Auld*. That decision, on its face and in the context of the issues resolved by the district court's order of dismissal, must be read for what it is: a fact-bound application of state constitutional doctrine. The state appellate court, like the state district court before it, reviewed the evidence of the state prosecutor's conduct, measured it against the Colorado Constitution's separation of powers guarantees, and found the state prosecutor's conduct wanting.

As to matters such as these arising solely under Colorado's laws, this Court can provide no relief. This Court should deny the State of Colorado's Petition for Certiorari.

Dated: January 27, 1992.

Respectfully submitted,

HADDON, MORGAN & FOREMAN, P.C.

HAROLD A. HADDON
(Counsel of Record)

RACHEL A. BELLIS
150 East Tenth Avenue
Denver, Colorado 80203
Telephone: 303/831-7364

RESPONDENT'S APPENDIX

DISTRICT COURT, LA PLATA COUNTY, COLORADO
CASE NO. 88 CR 129

ORDER

PEOPLE OF THE STATE OF
COLORADO,

Plaintiff,

vs.

ROBIN K. AULD,

Defendant.

This matter coming on for motions hearings on April 24 and 25, 1989, in the District Court for La Plata County, Colorado, the defendant present in person and by his attorney, Mr. Harold A. Haddon, and the People appearing by its attorney, Mr. Keith Cross, the Court taking testimony, hearing evidence, reviewing the Court file, and being otherwise advised in the premises, hereby enters the following order:

* * *

IV. DEFENDANT'S MOTION TO DISMISS BASED ON
GOVERNMENTAL MISCONDUCT

The defense in this case filed two motions to dismiss, one based on governmental misconduct and the other based on outrageous government misconduct as a due process violation. The defense alleges four grounds for

dismissal and the Court will consider three of them together, namely, that the officers did not have probable cause or suspicion to target the defendant for an undercover operation and even if they did, that when the defendant refused to accept drugs for fees, the undercover action should have been discontinued. The Court rejects this argument. First of all, it is contrary to the evidence adduced at the preliminary hearing, the motions hearings and the tape recordings of the conversations between the undercover officer and the defendant. The evidence is clear that the undercover officer offered the defendant, in his capacity as an attorney, drugs in exchange for fees and legal services, however, the defendant rejected the drugs and instead himself offered to accept guns at black market prices. There is no case law nor statutory law to suggest or support the defendant's contention in this regard. Secondly, the defense claims that the government's conduct was outrageous in that it constituted an impermissible infringement on the attorney/client relationship by creating a false client for the attorney, by trying to turn the attorney into an informant against his clients, and involves tape recordings of the attorney/client discussions without the consent of the attorney. The Court also rejects this claim for the reasons stated above in the discussion dealing with the suppression of the tape recordings.

Likewise, and thirdly, the defendant claims that the law enforcement officer deliberately failed to record certain conversations and thereby engaged in selective recording resulting in the destruction of potentially exculpatory evidence. Again, this has been discussed above, and the Court has found that there is no evidence

in the record to support this claim and the idea that any conversations which were not recorded contained exculpatory evidence is mere conjecture on the part of the defendant.

The Supreme Court of Colorado in the case of *People in Interest of M.N.*, 761 P.2d 1124 (Colo. 1988), discussed at great length the issue of governmental misconduct which would be so outrageous as to warrant a dismissal of the charges against the defendant as violative of due process. In reviewing the Supreme Court's discussion in those cases, it is clear that the three reasons asserted by the defendant discussed above do not rise to such a level, and at the most, would only constitute factual matters possibly relevant to the defendant's claim of entrapment.

A fourth and more troubling reason asserted by the defendant is the claim that law enforcement officials through the District Attorney's office caused false and purged documents to be filed in the La Plata County Court and that the undercover officer, Brent Pace, in his role as the fictitious client named Colt Young, provided false statements to the Court.

In its motion and brief, the defense states that, based on *People in the Interest of M.N.*, *supra*, the Court should rule on the due process argument only after the trial and only after the entrapment defense is rejected by the jury. This Court can certainly be wrong, however, I do not read the *M.N.* case to so state. The Court at Page 1131 of its opinion distinguished between the outrageous governmental conduct defense and the affirmative defense of

entrapment, and stated that the due process issue is interwoven with the entrapment defense. It is clear the entrapment defense involves questions of fact which are resolved by the trier of fact, however, I see nothing in the *M.N.* [sic] which indicates that the Supreme Court disapproves of the trial judge determining this motion prior to trial. The Supreme Court reversed the District Court in that case, but made no reference that I can see disapproving of the trial court's procedure. Therefore, for better or worse, the Court will enter an order relating to the defendant's motion to dismiss based on governmental misconduct and the due process argument related to governmental misconduct.

The activities in the *M.N.* case involved an undercover drug enforcement officer enrolled at a Montezuma-Cortez high school. The undercover officer became involved with a student named *M.N.* and gave the juvenile money to purchase marijuana. The undercover officer also asked *M.N.* to steal tires and rims and car stereos. The juvenile and the undercover officer were arrested so that the juveniles were not aware that the undercover officer was in fact a law enforcement officer. A few days after the arrest, the undercover officer persuaded the juveniles to purchase additional marijuana. Thereafter, delinquency petitions were filed concerning the juveniles. At a hearing on the motion to dismiss, the trial court found that the undercover officer violated C.R.S. 1973, 19-3-119 by inducing, aiding or encouraging a child to violate the law. The District Court dismissed the petitions and the Supreme Court reversed the dismissals.

The fact scenario in the instant case as a result of the preliminary hearing, the motions hearings and the evidence adduced at said hearings, reveal that law enforcement officers in La Plata County were trying to interdict the drug traffic and placed an undercover officer, Brent Pace, who went by the fictitious name of Colt Young, in Durango, Colorado. The undercover officer frequented certain establishments known to the police for their activities and in the course of several months became aware of information which caused them to believe that defendant Auld was possibly involved with drugs. In cooperation with the La Plata County Sheriff's Department, the Durango Police Department and the District Attorney's Office, the undercover officer as Colt Young was arrested in a public establishment, taken to the jail and booked on charges of unlawfully carrying a concealed weapon and possession of marijuana as misdemeanor offenses. The defendant posted a surety bond on September 6, 1988, which bond was sworn to under oath in front of a Deputy Clerk for the County Court, and subsequently filed in the County Court for La Plata County. The District Attorney's office prepared a fictitious offense report and the District Attorney himself prepared a misdemeanor complaint charging the defendant with carrying a concealed weapon and possession of marijuana as a misdemeanor and caused the complaint to be filed in the La Plata County Court.

When the defendant was arrested, he was brought before the La Plata County Judge, Judge Patricia A. Hall, and advised of his rights, the charges and the penalties for which he was arrested and was questioned by the Court about general information relating to his status and

his bond. During the course of that Court appearance, a transcript of which was introduced into evidence at the hearings marked defendant's Exhibit B, the undercover officer as the fictitious Colt Young made numerous false statements to the Judge. The next Court appearance was on September 23, 1988, for the filing of charges, during which the defendant Auld represented the fictitious Mr. Young and entered a plea of not guilty and requested a trial. Later, on October 11, 1988, the case was dismissed by the District Attorney's office.

I have set out the two basic fact scenarios of the *M.N.* case and the instant case because the fact scenario in the *M.N.* case and the cases discussed in the *M.N.* case all involve conduct of law enforcement officers within their own arena, that is the Executive Branch. The Supreme Court in the *M.N.* case discussed numerous cases, most of them Federal cases, which recognize that in a proper case, the conduct of the government may be so outrageous as to shock the conscience resulting in a dismissal. I cannot find in any of those cases nor in the *M.N.* case itself discussion relating to a situation in which the undercover activities of law enforcement have crossed over from the Executive Branch to the Judicial Branch. A general proposition which seems to stem from the *M.N.* case is that as long as the undercover activity, even though it may involve illegal activities on the part of the law enforcement officers themselves, stays within the Executive Branch, the courts will not interfere unless the conduct is outrageous within the Executive Branch itself. The courts have essentially recognized that law enforcement is entitled to some degree to fight fire with fire and as stated on Page 1131 of the *M.N.* case:

"It is the duty and role of the District Attorney, not the Judge, to decide whether justice requires that a particular individual should be charged with violating a criminal statute. A Judge does not have the power to charge an individual with violation of a criminal statute . . . "

Therefore, unlawful activities performed by undercover officers in the performance of their duties does not necessarily subject the officers to prosecution, particularly where the undercover activity is confined to their own arena, the Executive Branch.

The problem in this case is the involvement of the Court system and judiciary as an involuntary extension of the undercover activities of the law enforcement officers. Defendant's Exhibit G is a surety bond filed with the Court for La Plata County in Case No. 88 M 291 signed by the fictitious Colton Young and under oath on September 6, 1988, in front of a Deputy Court Clerk. Defendant's Exhibit H is the complaint against the fictitious Colton Young charging him with unlawfully carrying a concealed weapon and the mesdemaneor [sic] marijuana charge sworn under oath on September 19, 1988, by Tony James, a law enforcement officer and notarized by the wife of the District Attorney, Mary Katherine Reichman. This document was filed in the La Plata County Court Case Number 88 M 291. Defendant's Exhibit B is the transcript of proceedings which took place in the La Plata County Court for the fictitious Colton Young on September 13, 1988, and on September 23, 1988. This Court is not aware of any case or statute which sanctions the filing of false and perjured documents in an official court proceeding as part of an undercover operation.

C.R.S. 1973, 18-8-503, Perjury in the Second Degree, 18-8-502, Perjury in the First Degree, and 18-8-504, False Swearing are all offenses under the Colorado Criminal Code, and the definitions of "materially false statement" and "Oath" are defined in 18-8-501. All of these offenses to some degree may have occurred in the La Plata County Court Case No. 88 M 291 against the fictitious Colton Young. The District Attorney, Mr. Vic Reichman, testified on cross-examination that he prepared the complaint which was filed in 88 M 291, but thought it was alright because the complaint was part of their undercover operation and was designed to give their informant credibility since the defendant in the instant case was an attorney himself. On cross-examination, Mr. Reichman stated that that was his motive, however, the intent was to file a false document with respect to the fictitious Colton Young and that there was no intent, in reality, to actually charge the fictitious Colton Young with "real" criminal charges.

Sergeant Ball, who was in charge of the undercover operation, testified at the hearings that he did not intend for the undercover operation to get as far as it did, and was not aware that false and fictitious documents would be filed with the court, and was not aware that the undercover officer as the fictitious Mr. Young would make false statements to the Judge in open court. The undercover agent himself testified that he did not think the operation would go so far, but felt that he had to make those false statements when he found himself in court so as not to blow his cover. Additionally, defendant's Exhibit J, a letter dated November 2, 1988, from the District Attorney to the Sheriff's office, Mr. Reichman, in attempting to persuade law enforcement officers to

refrain from any further procurement activity with respect to the defendant Auld, states that:

" . . . if you or any other officer under your direction persists in pressuring Mr. Auld directly or indirectly to assist law enforcement, I will immediately request the appointment of a special prosecutor and divorce myself fully from any other LEADS activities. I regret having to take such a firm stand, but this seeming approach of 'the ends justify the means' is of great concern to me"

It seems to this Court, based upon the testimony of the law enforcement officer in charge of the undercover operation, the undercover officer, and the District Attorney, that they themselves feel their activities in involuntarily involving the Court in their undercover operations is highly questionable. The case of *United States v. Omni Inter. Corp.*, 634 F. Supp. 1414 (D) Md. 1986 [sic], discusses at great length the idea of governmental misconduct, and the dismissal of charges based on governmental misconduct. That case involved an IRS case against the defendant concerning tax fraud and tax evasion. After a long discussion, the court in that case dismissed the charges against the defendant because of outrageous governmental misconduct. The court there rejected the defense argument that breaches of the attorney/client privileges amounted to governmental misconduct, however, the court did dismiss based on three general categories of concern found at Page 1423, specifically altered and created documents, incorrect testimony before the court along with criminal allegations of perjury and obstruction of justice, and what the court called a disheartening lack of candor with and testimony before the court. Although

the testimony in that particular case occurred over a several month period of time, the court at Page 1428 stated:

"The second major area of concern to the Court involves the repeated untrue and incorrect testimony which occurred during the course of the proceedings. The impact of such testimony to this Court, setting [sic] as fact finder for the evidentiary hearing, cannot be underestimated. Based on the erroneous testimony given, as uncovered during the hearing, the Court simply cannot put its complete trust and confidence in certain government witnesses."

At Page 1432, the court stated:

"The *motive* involved in this case is irrelevant to the Court's disposition of the matter. The critical fact is that there was a considerable amount of false, wrong testimony"

The third area of the court's concern may be described as lack of candor. It is clear beyond [sic] any doubt that misrepresentations were made to the court, from the beginning of the evidentiary hearing. Misrepresentations occurred in colloquies with the court and in testimony by witnesses. The court then goes on beginning at Page 1436 to wrestle with the question of what sanctions should be imposed. The court begins by saying at Page 1436:

"The issue of dismissal of the indictment is not an easy one. The use of the supervisory power supports three institutional goals: Deterring illegal conduct by government officials, protecting and preserving the integrity of the judicial process, and implementing a remedy for violation of recognized rights."

The court then goes on to wrestle with the question of whether or not actual prejudice to the defendant must be shown in order to dismiss the charge, and concludes under the facts of that case that the misconduct was extreme, flagrant and that the misconduct was not isolated, but long standing. The court stated at Page 1438 of its opinion that:

"Decisions emphasize the unifying premise in all of the supervisory power cases that although the doctrine operates to vindicate a defendant's rights in an individual case, it is designed and invoked primarily to preserve the integrity of the judicial system"

Utilization of the supervisory power remains a harsh ultimate sanction, but must be used for "conduct that shocks the conscience." The court has particularly stressed the need to use the supervisory power to prevent the federal courts "from becoming accomplices to such misconduct." The court finally rejects the prosecution argument that all of this was "harmless error" and dismissed the indictment.

The facts in the *Omni* case are certainly more aggressive than [sic] is present here, however, the question remains to be settled of where this line of demarcation is. How far can the Executive Branch involve the Judicial Branch, whether knowingly or unknowingly, as an accomplice to its undercover operations. The courts, including the Supreme Court of the State of Colorado have long recognized the need and the desirability of law enforcement to conduct undercover operations for the protection of society and certainly no one quarrels seriously with that proposition. However, as stated before,

most of the cases deal with activities within the Executive Branch itself, that is, the law enforcement operations themselves, and do not involve cases in which the Judicial Branch is involved. If there is any separation of powers and any independence of the branches of government, then it cannot be that a law enforcement officer or a district attorney decides when and to what extent the judiciary becomes involved, knowingly or unknowingly, in its undercover operations. This is particularly so when the courts are supposed to be the one arena of impartiality favoring neither the prosecution nor the defense.

The Illinois case of *In Re Friedman*, 392 N.E. 2d 1333 (1979) involved a disciplinary proceeding before the Supreme Court of Illinois on facts somewhat similar here. The respondent in that case is Colorado's equivalent of a district attorney who had participated in an undercover operation which involved false court documents and false testimony, although in one of those instances the court, after the hearing, was advised of the circumstances surrounding the case. The respondent in that case argued at Page 1334 of the opinion that:

"The courtroom is not immunized by the code of professional responsibility from investigation methods otherwise lawful and ethical and that perjury and the secreting of witnesses are necessary methods for the successful investigation and prosecution of corrupt attorneys, whose stealth makes less deceptive investigatory techniques ineffective."

The respondent further argued that his loftiest motive negates any technical violation of the Code of Professional Responsibility. The court goes through an analogy

of the ABA Standards for Professional Conduct such as DR7-109 and the court found at Page 1335 that the respondent's conduct deviated from the disciplinary rules. The court states at page 1335:

"He (the respondent) argues that to impose discipline for his conduct would give more emphasis to the abstract concept of the courtroom's sanctity then [sic] to the substances of an honest legal system. While respondent asserts that he is not arguing that the end justifies the means, we so construe his argument and find it unacceptable. The integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."

The court goes on to quote Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928) as follows:

"Decency, security and liberty alike demand that governmental officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potentate, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine, this court should resolutely set its face."

The court further goes on to state that because the respondent acted without guidance of prescedent [sic] or settled opinion (which sounds exactly like this case) the Supreme Court of Illinois concluded that no sanctions should be imposed.

In agonizing over this decision, this Court concludes that the rationale in the *Omni* case and the *Friedman* case should control. It would be far easier for this Court to say that there was no actual resulting prejudice to the defendant and therefore deny the requested dismissal, however, the public has a right to demand and to expect that the courts will do their utmost to remain impartial and to promote the public's confidence in the integrity of the courts. The courts should not, and this Court certainly does not, sanction the filing of false and fictitious documents with the Court nor the securing of false and fraudulent misrepresentations to the Court regardless of the motive. In my mind, this is a clear line of distinction which separates this case from the *M.N.* case and those cases discussed in the *M.N.* case, and constitutes an impermissible taint upon the integrity and impartiality of the courts. Therefore, defendant's motion to dismiss for governmental misconduct is granted.

* * *

Resp. App. 15

For the reasons stated above, the Court hereby dismisses the Complaint against the defendant, and vacates the trial date of May 22, 1989.

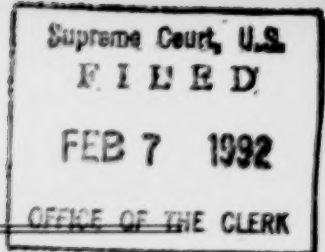
DATED this 12 day of May, 1989.

BY THE COURT

/s/ Richard J. Brown
Richard J. Brown,
Acting District Court Judge

xc: Haddon
Cross

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No. 91-841



In The
Supreme Court of the United States
October Term, 1991

THE STATE OF COLORADO,
Petitioner,
vs.

ROBIN AULD,
Respondent.

Petition For Writ Of Certiorari To The
Colorado Court Of Appeals
No. 89CA0995

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

MILTON K. BLAKEY*
District Attorney

- KEITH CROSS
Assistant District Attorney

Special Prosecutors
Attorneys for Petitioner

109 8th Street, Suite 308
Glenwood Springs, Colorado 81601
Telephone: (303) 945-8635

*Counsel of Record

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ARGUMENT

Respondent, in his Brief in Opposition, essentially presents two objections to the Court's issuing a Writ of Certiorari: (1) that the issues raised in the Petition were not preserved, and (2) that the issues raised were decided on the basis of the Colorado Constitution. Even a cursory reading of the opinion of the Colorado Court of Appeals in this case demonstrates that the issues raised in the Petition were addressed and decided by that court. Additionally, the ruling of the Court of Appeals is *not* expressly (or even impliedly) an application of state constitutional law. Thus, this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), is dispositive of the Respondent's jurisdictional objection.

In his brief, the Respondent confuses due process arguments concerning entrapment and attorney-client privilege, which were rejected by the trial court and *not* the subject of the appeal, with the outrageous governmental misconduct/due process issue decided by the Court of Appeals in this case. To further support his "failure to preserve" argument, the Respondent would have this Court view the Court of Appeals' decision as some sort of state court disciplinary procedure. This was a criminal case, not a disciplinary proceeding. As indicated in the Petition, there were independent disciplinary proceedings taken by the Colorado Supreme Court arising from the facts of this case. In its opinion below, the Colorado Court of Appeals expressly relies upon the outrageous governmental misconduct/due process doctrine established by this Court in *United States v. Russell*, 411 U.S. 423 (1973). (See Pet. App. 3-4.)

Respondent cites state court powers and the state constitution numerous times in his brief. However, the Colorado Court of Appeals makes no mention of state court powers or the state constitution anywhere in its opinion.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court made clear that state court decisions which appear to rely primarily on federal law will be presumed *not* to have independent state grounds, absent an express indication that the federal cases cited are being used merely for the purpose of guidance and do not themselves compel the result. This Court made the following statement: "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law grounds is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1040-1041.

As previously noted, the Colorado Court of Appeals, from the outset, bases its opinion on the outrageous governmental misconduct/fundamental fairness doctrine of *United States v. Russell*, 411 U.S. 423 (1973). The Court of Appeals goes on to state that this doctrine has been recognized and discussed in two Colorado cases, *Bailey v. People*, 630 P. 2d 1062 (Colo. 1981) and *People in Interest of M.N.*, 761 P. 2d 1124 (Colo. 1988). Both the Colorado Court of Appeals and the trial court cite, as additional authority, the case of *United States v. Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986). The Colorado

Constitution is not mentioned in either the district court's or the appellate court's decision, and nowhere does the Court of Appeals even suggest that its holding rests upon state grounds.

In support of his independent state grounds argument, the Respondent has cited a number of cases, all of which are inapposite. *Dreyer v. Illinois*, 187 U.S. 71 (1902), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Highlands Farm Dairy v. Agnew*, 300 U.S. 608 (1937), all involved state statutes which allegedly shifted the powers of one branch of state government to another. *May v. Supreme Court of State of Colorado*, 374 F. Supp. 1210 (D. Colo.), aff'd., 508 F.2d 136 (10th Cir. 1974), involved a state supreme court rule which required attorneys to pay registration fees. *International Brotherhood v. Hanke*, 339 U.S. 470 (1950) involved the review of a Washington Supreme Court ruling which was expressly based upon questions of state policy. All of these cases involved matters exclusively of state concern.

CONCLUSION

The Respondent's argument that this case was decided upon "uniquely state constitutional doctrines" is simply not supported by the opinion itself. As written, the Colorado Court of Appeals opinion misapplies this Court's decision in *United States v. Russell*, 411 U.S. 423 (1973). The Respondent's argument that this case is "fact-bound" and will not impact other prosecutions is, at best, inaccurate, and, at worst, disingenuous. This case has been and will continue to be cited for the proposition

that a court may dismiss a criminal prosecution upon a showing of outrageous governmental misconduct wholly unrelated to any constitutionally protected right of the defendant. Accordingly, the Petitioner respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,

MILTON K. BLAKEY*
District Attorney

Keith Cross
Assistant District Attorney

Special Prosecutors
Attorneys for Petitioner
109 8th Street, Suite 308
Glenwood Springs, Colorado 81601
Telephone: (303) 945-8635

*Counsel of Record

